No. 94-286

FILED
DEC 13 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FREIGHTLINER CORPORATION,
Petitioner,
v.
BEN MYRICK AND EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.
JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.,
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Whether, under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.*, Federal Motor Vehicle Safety Standard 121, 49 C.F.R. § 571.121, preempts respondents' negligent design claims.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT DOES NOT PREEMPT STATE COMMON LAW CLAIMS	7
A. The Safety Act Does Not Expressly Preempt State Common Law Claims For Negligence Or Defective Design	8
B. The Safety Act Expressly Preserves State Common Law Claims Even When NHTSA Has Promulgated An Applicable Safety Standard	15
II. STATE COMMON LAW ACTIONS ENHANCE MOTOR VEHICLE SAFETY AND ARE A NECESSARY ADJUNCT TO NHTSA RULEMAKING EFFORTS	24
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330 (D.C. Cir. 1968)	26
Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918)	18
Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	5, 15, 19
Chrysler Corp. v. Department of Transp., 472 F.2d 659 (6th Cir. 1972)	26-27
Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992)	*passim*
Commissioner v. Brown, 380 U.S. 563 (1965)	18
Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987)	18
CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732 (1993)	7, 11, 19, 20
Goodson v. McDonough Power Equipment, Inc., 443 N.E.2d 978 (Ohio 1983)	14
H & H Tire Co. v. Department of Transp., 471 F.2d 350 (7th Cir. 1972)	26
Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982)	23
MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916)	2
Molzof v. United States, 112 S. Ct. 711 (1992)	16
Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992)	17, 18
Morissette v. United States, 342 U.S. 246 (1952)	16
Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983)	8, 9, 29
Morton v. Mancari, 417 U.S. 535 (1974)	18
NLRB v. Amax Coal Co., 453 U.S. 322 (1981)	16
Paccar, Inc. v. National Highway Traffic Safety Admin., 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978)	26
Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1915)	19
Public Citizen v. Steed, 851 F.2d 444 (D.C. Cir. 1988)	29
Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976)	18

TABLE OF AUTHORITIES—Continued

	Page
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	7, 23
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	13
State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987)	29
The T.J. Hooper, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932)	5, 13, 21, 25
Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	17, 17-18
Texas & Pacific Ry. v. Behymer, 189 U.S. 468 (1903)	21
In Re Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978)	18
United States v. Neustadt, 366 U.S. 696 (1961)	16
Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972)	26

STATUTES AND REGULATIONS

49 C.F.R. § 571.208	29
National Traffic and Motor Vehicle Safety Act, 80 Stat. 718, 15 U.S.C. §§ 1381 *et seq.*	8
5 U.S.C. § 553(c)	26
5 U.S.C. § 706(2)(a)	26
15 U.S.C. § 1381	*passim*
15 U.S.C. § 1391(2)	3, 9, 10
15 U.S.C. § 1392(a)	10
15 U.S.C. § 1392(d)	*passim*
15 U.S.C. § 1392(f)	3-4, 10
15 U.S.C. § 1397(a)	19
15 U.S.C. § 1397(k)	*passim*

LEGISLATIVE AND ADMINISTRATIVE MATERIALS

112 Cong. Rec. 14230 (1966)	17
Federal Motor Vehicle Safety Standards, Stability and Control Requirements for Medium and Heavy Duty Vehicles, 57 Fed. Reg. 24212 (1992) (Notice of Proposed Rulemaking)	6, 28

TABLE OF AUTHORITIES—Continued

	Page
Federal Motor Vehicle Safety Standards, Stability and Control Requirements for Medium and Heavy Duty Vehicles, 59 Fed. Reg. 17326 (1994) (Supplemental Notice of Proposed Rulemaking)	6, 28
National Traffic And Motor Vehicle Safety Act of 1966, S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709	*passim*
OTHER AUTHORITIES	
John S. Allee, *Product Liability* (1989)	14
Black's Law Dictionary (6th ed. 1990)	14, 18
Stephen Breyer, *Judicial Review Of Questions Of Law And Policy*, 38 Admin. L. Rev. 363 (1986)	25, 27
W. Page Keeton, *et al., Prosser and Keeton on Torts* (5th ed. 1984)	16, 19, 20, 30
Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257 (1987)	6, 26, 27, 28
Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety* (1990)	25, 29
Ralph Nader & Joseph A. Page, *Automobile Design and the Judicial Process*, 55 Cal. L. Rev. 645 (1967)	25
Restatement (Second) of Torts (1965)	*passim*
Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work In Product Liability*, 31 N.Y.L. Sch. L. Rev. 583 (1986)	14
U.S. Congress, Office of Technology Assessment, *Gearing Up for Safety: Motor Carrier Safety in a Competitive Environment* (1988)	28
U.S. Department of Transportation, National Highway Traffic Safety Administration, *European/Australian Experience with Antilock Braking Systems in Fleet Service* (1988)	28
U.S. Department of Transportation, National Highway Traffic Safety Administration, *Improved Brake Systems for Commercial Motor Vehicles* (1991)	6, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-286

FREIGHTLINER CORPORATION,
Petitioner,
v.

BEN MYRICK AND EMILY MYRICK,
Respondents.

NAVISTAR INTERNATIONAL TRANSPORTATION CORP.,
Petitioner,
v.

JACK LINDSEY, EXECUTOR OF THE ESTATE AND SURVIVING SPOUSE OF GRACE C. LINDSEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case involves an issue at the core of *amici*'s interests: whether the National Traffic and Motor Vehicle Safety Act (Safety Act), 15 U.S.C. §§ 1381 *et seq.*, preempts state tort claims premised on a manufacturer's negligence in designing a motor vehicle and its equipment.

The States, through the mechanism of tort liability, have long protected their citizens by requiring that manufacturers compensate those injured by negligently and defectively designed products. *See, e.g., MacPherson v. Buick Motor Co.,* 111 N.E. 1050 (N.Y. 1916). In the context of negligently designed motor vehicles, state tort liability also promotes the public safety by encouraging manufacturers to design their products in light of available safety technology. In keeping with the Safety Act's purpose of reducing the toll of motor vehicle accidents, deaths and injuries, *see* 15 U.S.C. § 1381, Congress expressly preserved state tort liability even when a claim is premised on a negligent design which otherwise complies with an applicable Federal standard. *See* 15 U.S.C. § 1397(k).

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt respondents' statement.

---

[1] The parties have consented to the filing of this brief *amicus curiae.* Letters indicating their consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Consistent with its purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381, Congress, in enacting the Safety Act, expressly provided for a narrow scope of preemption of state authority. The text and structure of the Safety Act, as manifested in the express preemption provision of section 1392(d) and the savings clause of section 1397(k), demonstrate that Congress did not intend to preempt but rather to preserve respondents' tort claims.

1. By its terms, the Safety Act's express preemption provision prohibits the States from "establish[ing] or . . . continu[ing] in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d). This provision expresses Congress' limited purpose of preempting only state performance based safety standards such as those embodied in positive law (*e.g.*, statutes and regulations), not common law liability. The Safety Act's definitional section explains that the term " '[m]otor vehicle safety standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance." *Id.* § 1391(2). As the Senate report explains, the Federal standard "will be analogous to a building code which specifies the minimum load-carrying characteristics of the structural members of a building wall, but leaves the builder free to choose his own materials and design." National Traffic And Motor Vehicle Safety Act of 1966, S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2714.

The conclusion that section 1392(d) does not preempt common law liability is buttressed by section 1392(f), which directs that "[i]n prescribing standards under this section, the Secretary shall . . . consult with the Vehicle

Equipment Safety Commission and such other State or interstate agencies (including legislative committees) as he deems appropriate." 15 U.S.C. § 1392(f). The Senate Report notes, "[t]he Secretary is directed to consult with the Vehicle Equipment Safety Commission, and such other State and interstate agencies, including legislative committees, as he deems appropriate, in order to utilize the experience existing in the States and to encourage them to adopt standards which are identical to the Federal ones." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2715.

Congress also recognized that industry councils can establish safety standards. It is clear, however, that Congress did not view the imposition of common law liability as "establish[ing]" or "continu[ing] in effect" a safety standard. 15 U.S.C. § 1392(d). As the Senate Report explains, "with the exception of a handful of State regulations and the Federal seat belt and brake fluid laws, the automobile sold generally in interstate commerce is today subject only to the standards produced by the committees of the Society of Automotive Engineers." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. Congress thus did not view the imposition of tort liability as "establish-[ing]" or "continu[ing] in effect" a safety standard. Rather, it viewed the preemptive force of section 1392(d) as applying only to those non-identical safety standards adopted through the States' legislative or regulatory processes.

2. The conclusion that section 1392(d) does not preempt state common law liability is buttressed by section 1397(k). Entitled "[c]ontinuation of common law liability," section 1397(k) provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). By its plain terms, section 1397(k) expressly preserves negligence and defective design claims even when the Secretary has established a "standard applicable to the same aspect of performance." 15 U.S.C. § 1392(d).

The provision thus goes far beyond the general remedies savings clauses which the Court has traditionally subjected to conflict preemption analysis. *See, e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). Rather, it codifies as a substantive rule the venerable common law principle that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). Thus, in a normal situation, a manufacturer's compliance with the Secretary's standards would constitute reasonable care and would not be negligent. On the other hand, the common law has long recognized that compliance with industry standards is not dispositive of the issue of negligence because "a whole calling may have unduly lagged in the adoption of new and available devices." *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.) (L. Hand, J.), *cert. denied*, 287 U.S. 662 (1932). Because even an expert agency can lag in the adoption of safety standards which reflect "new and available" technology, allowing common law actions serves the Safety Act's transcendent purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.

None of petitioners' and their *amici*'s proffered constructions of section 1397(k) are persuasive. For example, petitioners suggest that section 1397(k) saves common law claims only until there is a federal standard on the subject. Pet. Br. 38 n.28. But if this is the case, then Congress had no need to enact the provision because section 1392(d) expressly preempts state standards only if the Secretary has established a safety standard. Likewise, the suggestion of petitioners' *amici* that section 1397(k) forecloses only field preemption analysis, *see, e.g.*, Br. *Am. Cur.* Products Liability Advisory Council 23, is contradicted by the text of section 1392(d), which explicitly recognizes that in the absence of an applicable

Federal standard the States retain authority to continue to enforce their existing standards and adopt new ones.

3. The preservation of common law actions is of particular importance given the constraints on NHTSA's efforts to update, through the rulemaking process, safety standards which no longer reflect current technology. In practice, NHTSA's rulemakings have been subject to "hard-look" judicial review. *See* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257, 277-86 (1987). The net effect of judicial review of NHTSA's rulemaking efforts has been to greatly limit the agency's power to improve the state of automotive safety technology and to arm the manufacturing industry with numerous weapons in its battles against the agency's rulemaking efforts. It has also led to lengthy delays, if not paralysis, in the promulgation of safety standards. *Id.* at 283; 295-97.

The standard at issue in this case demonstrates the halting pace of NHTSA rulemaking and the inappropriateness of granting petitioners a shield from liability under the guise of vindicating the supremacy clause. Notwithstanding that by the mid-1980's antilock brakes were in widespread and reliable use on trucks and other commercial vehicles in the United Kingdom and West Germany, *see* U.S. Department of Transportation, National Highway Traffic Safety Administration, *Improved Brake Systems for Commercial Motor Vehicles* § 3.3.3.3 (1991), NHTSA did not propose a rule requiring antilock brakes on trucks until June 1992. *See* 57 Fed. Reg. 24212 (1992). Assuming the rulemaking is not delayed by litigation, the antilock brake requirement will be implemented over the years 1996-1998, at least a decade after the technology was safe and reliable. *See* 59 Fed. Reg. 17326, 17328 (1994).

Under petitioners' view of sections 1392(d) and 1397(k), the existence of a NHTSA standard forecloses

a common law claim premised on the same aspect of performance regardless of whether the agency's standard reflects the current state of technology. Petitioners' view results in the preemption of claims even where a NHTSA standard reflects technology long since surpassed. It likewise undermines the Safety Act's purpose of reducing traffic accidents, deaths, and injuries. *See* 15 U.S.C. § 1381. Accordingly, the Court should reject it.

ARGUMENT

I. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT DOES NOT PREEMPT STATE COMMON LAW CLAIMS

The determination as to whether federal law preempts state law is, of course, a question of congressional purpose. *See, e.g., CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732, 1737 (1993); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992). However, in recognition that under our federal system, the States play a significant role in protecting the health and safety of their citizens, every preemption inquiry " 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone*, 112 S.Ct. at 2617 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court has subsequently noted that this "strong presumption against pre-emption," *id.* at 2621, serves the vital "interest of avoiding unintended encroachment on the authority of the States." *CSX*, 113 S.Ct. at 1737.

Thus, in conducting preemption analysis, the Court has observed that in determining the scope of an express preemption provision, it "must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language" of the provision. *Cipollone*, 112 S. Ct. at 2621; *see also CSX*, 113 S. Ct. at 1739.

The presumption against preemption likewise requires that where Congress has spoken expressly as to the scope of preemption, the Court ordinarily must refrain from implied preemption analysis. *See Cipollone*, 112 S. Ct. at 2518. As the Court stated in *Cipollone*:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

Id. (internal citations omitted). As *amici* explain below, this rule applies with particular force where, as here, Congress has not only provided for a limited scope of preemption in the terms of a preemption provision, *see* 15 U.S.C. § 1392(d), but has also provided expressly for the saving of state law. *See id.* § 1397(k). Indeed, as its text, structure and legislative history make clear, the Safety Act expressly recognizes that the important task of improving motor vehicle safety requires not only federal regulation but also the preservation of state common law liability.

A. The Safety Act Does Not Expressly Preempt State Common Law Claims For Negligence Or Defective Design

In 1966, Congress, recognizing "that the current loss of life on our highways is unacceptably high," *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 33 (1983), enacted the National Traffic and Motor Vehicle Safety Act (Safety Act), 80 Stat. 718, 15 U.S.C. §§ 1381 *et seq.* The Safety Act, with its declared purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381, vests in the Secretary of Transportation the authority to "establish by order appropriate Federal

motor vehicle safety standards," which "shall be practicable, . . . meet the need for motor vehicle safety, and . . . be stated in objective terms." *Id.* § 1392(a); *see also Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 33.

Consistent with its declared purpose of improving motor vehicle safety, Congress limited the extent to which the Act preempts state law. The text and structure of the Safety Act, as manifested in the express preemption provision of section 1392(d), and the savings clause of section 1397(k), amply demonstrate that Congress did not intend to preempt but rather to preserve respondents' claims.

In relevant part, the express preemption provision of section 1392(d) states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). By its terms, the statute expressly preempts only a (non-identical) state "safety standard applicable to the same aspect of performance of such vehicle or item of equipment." *Id.* Thus, even where the Secretary has established a standard, Congress limited section 1392(d)'s preemptive force to only state performance based safety standards such as those embodied in positive law (*e.g.*, statutes and administrative regulations) and not common law standards of liability.

That the term "safety standard" embodies only vehicle and equipment performance standards and not common law standards of liability is confirmed by the definition Congress gave to the term "[m]otor vehicle safety standards" in 15 U.S.C. § 1391(2). As set forth in the Safety

Act's definitional section, this term "means a minimum standard for motor vehicle performance, or motor vehicle equipment performance." 15 U.S.C. § 1391(2). As the Senate Report explains, "the new and revised standards are expected to be performance standards, specifying the required minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. . . . Such standards will be analogous to a building code which specifies the minimum load-carrying characteristics of the structural members of a building wall, but leaves the builder free to choose his own materials and design." National Traffic And Motor Vehicle Safety Act of 1966, S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2714.

The conclusion that section 1392(d) does not preempt common law liability finds additional support in other provisions of section 1392. Congress directed that "[t]he Secretary shall establish . . . appropriate Federal motor vehicle safety standards," 15 U.S.C. § 1392(a), and that "[i]n prescribing standards under this section, the Secretary shall . . . consult with the Vehicle Equipment Safety Commission and such other State or interstate agencies (including legislative committees) as he deems appropriate." *Id.* § 1392(f). As Congress understood, performance based safety standards are "establish[ed]" by legislatures and agencies, and not by the courts. As the Senate Report explains:

> The Secretary is directed to consult with the Vehicle Equipment Safety Commission, and such other State and interstate agencies, including legislative committees, as he deems appropriate, in order to utilize the experience existing in the States and to encourage them to adopt standards which are identical to the Federal ones. . . . The Vehicle Equipment Safety Commission is specifically mentioned because 44 States and the District of Columbia are members of this organization, and it is the major existing agency which has authority to propose uniform safety standards for the member States to consider for adoption.

S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2715.

It is clear that Congress did not view the imposition of common law liability as "establish[ing]" or "continu[ing] in effect" a safety standard. 15 U.S.C. § 1392(d). This conclusion is reinforced by another portion of the Senate Report explaining that "with the exception of a handful of State regulations and the Federal seat belt and brake fluid laws, the automobile sold generally in interstate commerce is today subject only to the standards produced by the committees of the Society of Automotive Engineers." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. While Congress thus recognized that industry councils can establish safety standards, it is noteworthy that Congress did not view the imposition of common law liability as "establish[ing]" or "continu[ing] in effect" a safety standard.[2]

Ignoring the extensive evidence of Congress' limited purpose in enacting section 1392(d), petitioners assert that "[t]he critical term" in the provision is the word " 'standard,' " which in their view is "the normal term referring to the common-law duties imposed by tort law." Pet. Br. 30. Petitioners further note that "in *CSX v. Easterwood*, [the Court,] construing the phrase 'law, rule, regulation, order, or standard,' readily concluded that common-law duties 'fall within the scope of these broad phrases.' " *Id.* (quoting 113 S. Ct. at 1737).

---

[2] With respect to the industry's standards, the Senate Report further noted that "[t]hese SAE standards are the product of a committee consensus, subject to a single manufacturer's veto," that "[t]here exist no procedures to compel their adoption, monitor their use, or evaluate their effectiveness," and, most importantly, that "there exists today no significant alternative source of standards to the SAE." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. This passage provides further support for the conclusion that Congress did not view tort liability as establishing the type of performance based safety standards it preempted in section 1392(d).

The flaw in this argument is that section 1392(d) is not written so broadly as to preempt any state "standard" or any state "law, rule, regulation, order or standard." The word "standard" simply cannot be analyzed outside of the statutory context of section 1392(d). Rather, it must be construed in light of the statutory language, which expressly preempts only a state "safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d).

That Congress understood the terms "safety standard" and "common law standards of care" to be distinct terms of art is also supported by the Senate Report's discussion of the Safety Act's "effect on state law." As the Report explains, "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2720. Thus, while state law "standards of care" are, of course, standards, Congress did not view them as being "safety standard[s]" within the meaning of section 1392(d).[3]

Likewise, petitioners' view that section 1392(d) preempts state common law liability must be considered in light of the provision's language prohibiting the States from "establish[ing], or . . . continu[ing] in effect . . . [a] safety standard." 15 U.S.C. § 1392(d). Petitioners' view of section 1392(d)'s preemptive scope is simply ir-

[3] Petitioners rely on this same reference to argue that "[t]he use of the term 'standard' in referring both to the federal standards and to common-law duties confirms the natural meaning of 'standard' in Section 1392(d) as including common-law standards." *See* Pet. Br. 34 n.24. This argument likewise divorces the word "standard" from the statutory context. As explained above, Congress did not broadly preempt any state standard. Rather, it preempted "any safety standard applicable to the same aspect of [vehicle/equipment] performance." 15 U.S.C. § 1392(d).

reconcilable with Congress' recognition that, with respect to SAE standards. "[t]here exist no procedures to compel their adoption, monitor their use, or evaluate their effectiveness." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711. If, as petitioners argue, the imposition of tort liability "is designed to affect and does affect defendants' conduct," Pet. Br. 33, then surely it can "compel [the] adoption, monitor [the] use, or evaluate [the] effectiveness" of an industry standard. And if " '[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy,' " *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)), then there is nothing voluntary about an industry standard when it is imposed through tort liability. *See, e.g., The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.) (L. Hand, J.) (noting "cases where courts seem to make the general practice of the calling the standard of proper diligence"), *cert. denied*, 287 U.S. 662 (1932). Nonetheless, Congress did not view the SAE standards as mandatory and noted that there were "no procedures to compel their adoption, monitor their use, or evaluate their effectiveness." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2711.

As the foregoing demonstrates, Congress did not understand the imposition of common law liability as "establish[ing], or . . continu[ing] in effect . . . [a] safety standard." 15 U.S.C. § 1392(d). Rather, Congress understood the language it employed in section 1392(d) to preempt only non-identical state statutes and regulations prescribing a particular standard of motor vehicle and motor vehicle equipment performance. Even if imposing common law liability for negligent or defective design can be arguably understood as "establish[ing] . . . [a] safety standard," 15 U.S.C. § 1392(d), it does not follow that such claims are expressly preempted.[4] Rather, where a

[4] In common understanding, a verdict finding a manufacturer liable on a negligence or defective design claim does not "establish or continue in effect any safety standard." 15 U.S.C. § 1392(d). Notwithstanding that a verdict finding liability requires the pay-

statute is susceptible to differing interpretations, the presumption against preemption requires that absent a clear statement to the contrary, the Court must give effect to that interpretation which gives the greatest deference to state authority. *See, e.g., Cipollone*, 112 S. Ct. at 2621. As was noted in *Cipollone*, the Court "must fairly but—in light of the strong presumption against pre-emption—narrowly construe" section 1392(d). *Id.* "[F]airly but . . . narrowly construe[d]," section 1392(d) expresses a congressional purpose to preempt only non-identical state positive law and regulations prescribing a particular standard of vehicle or equipment performance, and not common law standards of care.

---

ment of damages, it simply does not "settle, make or fix firmly" any safety standard. *Black's Law Dictionary* 546 (6th ed. 1990) (defining "establish"). Nor does it involve the "creat[ion]" or "enact[ing] permanently" of a standard. *Id.* As a leading authority explains,

> factual variations are of great significance in product liability cases. The facts surrounding a particular product injury—the manner in which the product was used, the role of the plaintiff or others in contributing to the injury, the condition of the individual product unit—are highly relevant in a product liability lawsuit.

Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work In Product Liability*, 31 N.Y. L. Sch. L. Rev. 583, 587 (1986) (footnote omitted). Accordingly, outside of the context of asbestos and diethylstilbesterol (DES), courts have been unwilling to allow plaintiffs to engage in the offensive use of collateral estoppel in products liability litigation. *See* John S. Allee, *Product Liability* § 9.03[2] (1989); *see also Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 988 (Ohio 1983) ("non-mutual collateral estoppel may not be used to preclude the relitigation of design issues relating to mass-produced products when the injuries arise out of distinct underlying incidents").

Because of the numerous issues and factual differences raised in any case alleging that a manufacturer negligently or defectively designed automotive equipment, a verdict imposing liability would not estop a manufacturer from relitigating whether its design was negligent or defective in subsequent cases. Accordingly, the imposition of tort liability does not "establish" or "continue in effect any safety standard." 15 U.S.C. § 1392(d).

B. The Safety Act Expressly Preserves State Common Law Claims Even When NHTSA Has Promulgated An Applicable Safety Standard

1. The conclusion that the express preemption provision of section 1392(d) is a "reliable indicium" of Congress' purpose to preempt only state positive law and regulations prescribing vehicle performance standards and not state common law claims is buttressed by the savings clause of section 1397(k). Section 1397(k), which is entitled "continuation of common law liability," 15 U.S.C. § 1397(k), amply demonstrates that in enacting the Safety Act, Congress did not intend to preempt negligence and defective design claims even when the Secretary has established a "safety standard applicable to the same aspect of performance" of the vehicle or its equipment. *Id.* § 1392(d).

Section 1397(k) provides that:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1397(k). By its plain terms, section 1397(k) expressly saves negligence and defective design claims even when the Secretary has established a "standard applicable to the same aspect of performance." In the ordinary sense of its terms, section 1397(k) does far more than save existing common law remedies. *Cf., e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1981). Rather, it prescribes a substantive rule of decision by codifying the venerable common law principle that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). As the comment to § 288C explains:

> Where a statute, ordinance or regulation is found to define a standard of conduct for the purposes of negligence actions, . . . the standard defined is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation. This legislative or administrative minimum does not prevent a finding that a reasonable man would have taken additional precautions where the situation is such as to call for them. . . . Where there are no such special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the court as a matter of law, as sufficient for the occasion; but if for any reason a reasonable man would take additional precautions, the provision does not preclude a finding that the actor should do so.

Id. cmt. a. *See also* W. Page Keeton *et al., Prosser and Keeton on Torts* § 36, at 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue. Such a standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions.").[5]

---

[5] The Court has noted that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); *see also United States v. Neustadt*, 366 U.S. 696, 707 (1961) (noting that "there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the [Federal] Tort Claims Act"); *cf. Molzof v. United States*, 112 S. Ct. 711, 716 (1992); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

Given the textual similarity of section 1397(k)'s command that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability," 15 U.S.C. § 1397(k), to such contemporaneous formulations of the common law as Restatement § 288C's that "[c]ompliance with . . . an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions," there is further reason to conclude that Congress, in enacting section 1397(k), intended that in liability suits, issues related to a manufacturer's compliance with the Secretary's standards would be resolved in accordance with common law principles.

The conclusion that section 1397(k) expressly preserves a common law claim even where the Secretary has promulgated an applicable federal standard is also supported by the legislative history. As the Senate Report indicates in its discussion of the Safety Act's "effect on state law," "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2720; *see also* 112 Cong. Rec. 14230 (1966) (statement of Senator Magnuson).

While petitioners acknowledge that section 1397(k)'s "use of 'compliance' language . . . suggest[s] contemplation of a 'compliance with administrative regulations' tort defense . . . rather than the ordinary language of savings provisions," *see* Pet. Br. 37 n.28 (quoting *Restatement* § 288C), they nonetheless ignore the import of their concession. Quite remarkably, they argue that "the language of Section 1397(k) cannot be viewed as more preservative of inconsistent state law than the sweeping savings clauses that have been held . . . to be *in*sufficient to oust conflict preemption." Pet. Br. 35 (emphasis in original).

The general remedies savings clauses which this Court subjected to conflict preemption analysis in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992), and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), may well have been "sweeping." But the "sweep" of those clauses is naturally confined by their text. To say that "[n]othing in this act . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies,"

Abilene Cotton, 204 U.S. at 446, is to say nothing about Congress' preemptive purpose with respect to the underlying state substantive right. As the Court has noted, "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury." *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918); *see also Black's Law Dictionary* at 1294 (defining "remedy").

Thus, to subject a general remedies savings clause to conflict preemption analysis is to do no more than apply the traditional rule of statutory construction that " '[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one.' " *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 455 (1987) (emphasis in original) (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)); *see also Morales*, 112 S. Ct. at 2037. It likewise embodies the principle that a court not give a statute a literal reading where it " 'would lead to absurd results . . . or would thwart the obvious purpose of the statute.' " *In Re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)).

Here, however, Congress, undoubtedly aware of "the background rule of construction" of general remedies savings clauses, Pet. Br. 36, did not enact such a provision. Rather, as explained above, it enacted a specific substantive rule modeled on the common law rule that compliance with administrative regulations does not bar a finding of negligence if, under the circumstances, a reasonable person would have done more. *See* pp. 15-17, *supra*. If indeed, Congress had intended to enact only a general remedies savings clause, it had only to employ the language it used in such provisions as § 22 of the Interstate Commerce Act at issue in *Abilene Cotton*, and 49 U.S.C.

App. § 1506, the provision of the Federal Aviation Act of 1958 at issue in *Morales*.[6] Instead, Congress enacted a specific provision which, notwithstanding petitioners' contention to the contrary, *see* Pet. Br. 35, is far more preservative of state law than a general remedies savings clause.[7]

2. Petitioners also argue that "[n]othing in the language of Section 1397(k) refers to tort duties that conflict with federal standards." Pet. Br. 35. Petitioners thus reason that "[c]onflict preemption of a state-law duty that contradicts a federal policy . . . is not readily described as granting an 'exempt[ion]' based on 'compliance' with a federal standard. Rather, the state-law standard is rendered invalid by its inconsistency with federal law." *Id.* Petitioners also direly forecast that under the court

---

[6] The reliance of petitioners' *amici*, American Trucking Ass'n *et al.*, on *Kalo Brick* and *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915), is likewise unpersuasive. *See* Br. *Am. Cur.* American Trucking Ass'n *et al.* 12-13. Both cases involved the Interstate Commerce Act's general remedies savings clause which was at issue in *Abilene Cotton*. *See Kalo Brick*, 450 U.S. at 328; *Puritan Coal*, 237 U.S. at 129-30. As explained above, section 1397(k) is not such a provision.

[7] Ignoring the ordinary meaning of section 1397(k)'s text, petitioners also argue that its placement five sections after the express preemption provision "lend[s] support to the notion that the provision was not withdrawing *any* of the preemption provided for in Section 1392(d)." Pet. Br. 37 n.28; *see also id.* at 36 n.26. The best evidence of section 1397's purpose is, of course, its text, *see, e.g., CSX*, 113 S. Ct. at 1737, and not its placement relative to section 1392(d). Moreover, it is difficult to understand why Congress' placement of the provision in the statutory section proscribing the manufacturing and sale of vehicles not in conformance with federal standards supports ignoring its plain meaning. *See* 15 U.S.C. § 1397(a). Claims such as respondents' arise only because a manufacturer or dealer has either manufactured and/or sold a vehicle. *See generally Prosser and Keeton On Torts* § 100, at 704-707. Congress' placement of the provision in section 1397 is thus consistent with its text, which demonstrates that subsection (k) is not a general remedies savings clause, but rather a codification of a common law rule.

of appeals' view, "all specific design standards, all federally approved options, and all determinations that a particular requirement would be affirmatively *dangerous* would have no preemptive effect on tort suits. Manufacturers could be held liable under state law even for doing precisely what the federal regulations *required* them to do." *Id.* at 36-37 (emphasis in original).

The short answer to this argument is that respondents' negligent design claims do not conflict with NHTSA Standard 121 or any NHTSA policy. *See* Br. United States 26-29. Thus, while Standard 121 "effectively gave manufacturers the choice of whether to install anti-lock brakes," Pet. App. 6a, NHTSA has not affirmatively promulgated an option as a matter of federal policy but has left the area unregulated. *See* Br. United States 26-29.

Moreover, as a matter of statutory construction, petitioners' argument simply ignores the efficacy of the common law rule and overstates the consequence of applying section 1397(k) as written. Here, the plain wording of section 1397(k), "which necessarily contains the best evidence" of Congress' intent, *CSX*, 113 S. Ct. at 1737, can be given full effect by allowing petitioners to raise their compliance with federal standards as an affirmative defense in accordance with the common law rule. *See Restatement* § 288C. Thus, "[w]here there is a normal situation . . . it may be found, and can be ruled as a matter of law, that the actor has done his full duty by complying with the statute, and nothing more is required." *Prosser and Keeton on Torts* § 36, at 233; *see also Restatement* § 288C, cmt. a (compliance with "the minimum standard prescribed by the . . . regulation may be accepted by the triers of fact, or by the court as a matter of law" as proof that the manufacturers' conduct was reasonable).[8]

[8] *Cf. Prosser and Keeton on Torts* § 33, at 195 ("Cases will no doubt be infrequent in which any defendant will be held liable for failing to do what no one in his position has ever done before.").

By definition then, the common law rule is adequate to protect petitioners from the unwarranted imposition of liability because in the normal situation, a manufacturer's compliance with the Secretary's standard constitutes reasonable care and thus would not be negligent. Moreover, in those instances in which a plaintiff seeks to impose liability on the theory that a manufacturer should have done something that the Secretary has affirmatively prohibited, *see* Br. *Am. Cur.* Product Liability Advisory Council 29-30, a manufacturer's compliance with federal law would likewise constitute reasonable care.

On the other hand, as the common law has long recognized, compliance with industry standards or custom is not necessarily dispositive of the issue of negligence because "a whole calling may have unduly lagged in the adoption of new and available devices." *The T.J. Hooper*, 60 F.2d at 740.[9] In like fashion, even an expert agency can lag in the adoption of safety standards which reflect "new and available" technology.[10] Where, for example, technology has long surpassed NHTSA's standards, allowing common law actions serves the Safety Act's transcendent purpose of "reduc[ing] traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381, by creating an incentive for manufacturers to "adopt[] new and available devices." *The T.J. Hooper*, 60 F.2d at 740. Allowing manufacturers to escape liability simply because they have complied with a NHTSA standard would be entirely inconsistent with the Safety Act's express purpose of promoting the development of safer motor vehicles and reducing the toll of traffic deaths and injuries.

[9] *See also Texas & Pacific Ry. v. Behymer*, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not.").

[10] This has unfortunately turned out to be the case with respect to NHTSA. *See infra*, pp. 24-30.

3. While petitioners and their *amici* do offer various explanations as to § 1397(k)'s meaning, none of their proffered constructions give reason to depart from enforcing the statute in accordance with its clear terms. *Inter alia*, petitioners argue that "[a]s to state tort standards that add to, without contradicting, federal standards on a subject, . . . the text of Section 1397(k) lend[s] support to the notion that the provision was not withdrawing *any* of the preemption provided for in Section 1392(d)." Pet. Br. 37 n.28. Thus, petitioners largely view section 1397(k) as saving common law claims only "*until* there were [uniform national] standards on a particular subject." Pet. Br. 38 n.28.

This argument begs the question of why Congress enacted § 1397(k) in the first place. If Congress intended to preempt common law tort claims that add to, without contradicting, the federal standard, then it would have stopped with section 1392(d), which, under petitioners' view (Br. at 30), expressly preempts common law actions establishing "any safety standard applicable to the same aspect of performance . . . which is not identical to the Federal standard." 15 U.S.C. § 1392(d). Likewise, if Congress intended to save common law claims only where the Secretary has not established a standard, it had no need to enact § 1397(k). By its plain terms, section 1392(d) expressly preempts state common law claims only "[w]henever a Federal motor vehicle safety standard established under [section 1392] is in effect." *Id.* Thus, where the Secretary has not established a standard, the States necessarily retain "authority . . . to establish, or to continue in effect" their own standards. *Id.* As the court of appeals observed, this proffered reading of petitioners would render section 1397(k) a redundancy. *See* Pet. App. 8a.

Equally unpersuasive is the suggestion of petitioners' *amicus* the Products Liability Advisory Council that "section [1397(k)] precludes only field preemption." Br. *Am. Cur.* PLC 23. In two respects the terms of the express preemption provision, section 1392(d), foreclose any argument that "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone*, 112 S. Ct. at 2617 (quoting *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

First, Congress expressly provided for preemption of the States' "authority either to establish, or to continue in effect" their safety standards only when the Secretary establishes a Federal standard "applicable to the same aspect of performance." 15 U.S.C. § 1392(d). Section 1392(d) thus explicitly recognizes that in the absence of an applicable Federal standard, the States retain authority to continue to enforce their existing standards and adopt new ones. Second, Congress expressly provided that a State and its political subdivisions could establish safety requirements "impos[ing] a higher standard of performance than that required to comply with the otherwise applicable Federal standard" when "procur[ing vehicles] for [their] own use." *Id.* By expressly recognizing the authority of the States to impose safety standards and thus "supplement" the Federal scheme, these two provisions demonstrate that in enacting the Safety Act, Congress did not intend to occupy the field of motor vehicle safety regulation.

Nor is there any merit to petitioners' and their *amicus* PLC's alternative constructions of section 1397(k) as "negat[ing] mere compliance with existing government standards as a complete defense at trial," Br. Am. Cur. PLC 23, or as "reaching no further than to deny that mere compliance with all NHTSA standards automatically would defeat common-law duties." Pet. Br. 38-39. Contrary to petitioners' and their *amicus*' suggestion, this narrow view of section 1397(k) as embodying the nega-

tion of a generalized defense is foreclosed by the statutory text. Section 1397(k) simply does not speak in general terms; it does not state that "compliance with *the* Federal motor vehicle safety *standards* . . . does not exempt any person from any liability." Rather, it states that "[c]ompliance with *any* Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law," 15 U.S.C. § 1397(k) (emphasis added), and thus expressly recognizes that common law actions alleging negligent design or a design defect are preserved even when a manufacturer has complied with an applicable federal standard.

II. STATE COMMON LAW ACTIONS ENHANCE MOTOR VEHICLE SAFETY AND ARE A NECESSARY ADJUNCT TO NHTSA RULEMAKING EFFORTS

Construing section 1397(k) as saving common law actions even when the Secretary has established an applicable standard is entirely consistent with Congress' express declaration of the Safety Act's purpose "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Historically, the automobile industry was reluctant to improve the safety of its product. As the Senate Report noted:

> [T]he committee met with disturbing evidence of the automobile industry's chronic subordination of safe design to promotional styling, and of an overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection. The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in industry which has plainly resulted in the inadequate allocation of resources to safety engineering.
>
> Until the industry had been subjected to the prod of heightened public interest and governmental concern, new models showed little improvement in safe design or in the incorporation of safety devices. Such elemental safe design features as safety door latches made their appearance as standard equipment only a decade after their desirability and feasibility had been established.

S. Rep. No. 1301, 1966 U.S.C.C.A.N. at 2710.[11]

Allowing common law actions—notwithstanding a manufacturer's compliance with NHTSA's standards—simply recognizes that such compliance should not be dispositive of the issue of negligence because "a whole calling may have unduly lagged in the adoption of new and available devices." *The T.J. Hooper*, 60 F.2d at 740. It thus serves the Safety Act's transcendent purpose of reducing "deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The preservation of common law actions is of particular importance given the constraints on NHTSA's efforts to update, through the rulemaking process, safety standards which no longer reflect current technology.

For example, an agency may desire to update a standard to reflect available technology but lack the resources necessary to provide an adequate record to preserve the rulemaking from judicial invalidation. *See* Stephen Breyer, *Judicial Review Of Questions Of Law And Policy*, 38 Admin. L. Rev. 363, 393 (1986); Mashaw & Harfst, *The Struggle For Auto Safety*, at 80-83. Indeed, notwithstanding the supposedly deferential "arbitrary" and "capricious" standard of review of agency rulemaking

---

[11] *See also* Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety* 4 (1990) ("[N]othing much seemed to be changing in the design of the automobiles that were being produced—at least not in their *safety* design. In the 1950s and early 1960s, automobile 'design' meant automobile 'styling.' The urgent design questions seemed to concern tail-fin height and the shape of the grill."); Ralph Nader & Joseph A. Page, *Automobile Design and the Judicial Process*, 55 Cal. L. Rev. 645, 647 (1967) (noting that "self-regulation by the auto industry has so far not materialized").

mandated by section 10(e) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(a), in practice NHTSA's rulemakings have been subjected to the "hard-look" approach to judicial review epitomized by *Paccar, Inc. v. National Highway Traffic Safety Admin.*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), and other decisions. For example, under the guise of section 4 of the APA, 5 U.S.C. § 553(c), which requires that the agency consider the views of interested persons, lower courts have required that the agency address the "major issues" raised in the course of the rulemaking proceeding and respond thereto. *See Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). Thus, "[t]he Agency's failure to respond to significant issues of either fact or policy raised by a participant . . . provide[s] a straightforward basis for judicial challenge to the rationality of the Agency's rule." Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257, 277 (1987).

In subsequent cases, the courts imposed additional substantive and procedural requirements that have all but assured the demise of regulation through standard setting. These include the requirements that the agency provide affected parties with the opportunity to comment on any modifications to its rule made in response to a manufacturer's objection, *see id.* at 286 (discussing *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (3d Cir. 1972)), that it support a proposed standard with "on-the-road evidence of safety effects," *see id.* at 279-80 (discussing *H & H Tire Co. v. Department of Transp.*, 471 F.2d 350 (7th Cir. 1972)), that it respond to manufacturers' claims that a standard imposed excessive costs even though only the manufacturers had the data and could not be required to disclose it to the agency, *id.*, and that it provide complete specifications for testing equipment's performance characteristics. *Id.* at 282-83 (discussing *Chrysler Corp. v. Department of Transp.*,

472 F.2d 659 (6th Cir. 1972)).[12] The net effect of these decisions has been to limit NHTSA's power to improve the state of the art in automotive safety and to arm the manufacturing industry with numerous weapons in its battles against the agency's rulemaking efforts.

Moreover, because judicial review of NHTSA's rulemaking has generally focused on the agency's "decision process" rather than "decision product," the courts frequently "invalidate reasonable judgments that are badly explained or perhaps inexplicable in straightforward logical fashion." *Id.* at 294. As Mashaw and Harfst explain, because "[t]he fits, starts, and reversal of real decisionmaking look, from a rational-analytic perspective, like the fumblings of an incompetent or misguided administrator . . . no administrator will find it prudent to reveal the agency's real process of decision." *Id.* This only serves to create a strong incentive for the agency to preserve the status quo. *Id.*; *see also* Breyer, *supra*, at 391.

Likewise, the focus of judicial review on the process of the agency's decision has led to lengthy delay, if not paralysis, in the promulgation of rules and has given manufacturers every incentive to flood the rulemaking record with objections so as "to force the Agency to document the technical merits of any detail in its standards." Mashaw & Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety, supra*, at 283; *see also id.* at 295-97. This leads to even more delay as the

---

[12] As Mashaw and Harfst explain, the *Chrysler* decision was particularly paralytic to NHTSA's rulemaking efforts for two reasons. First, it placed the burden of developing testing equipment on the agency rather than the industry, even though "the [a]gency has a minuscule research budget, and virtually all automotive technology development (including that of performance testing devices) goes on within the industry." *Regulation and Legal Culture, supra*, at 282. Second, it imposed new burdens on NHTSA because the manufacturers' objection "was but one of scores thrown at the Agency in the [rulemaking] proceeding . . . [and] suggested that every objection should be given equal rebuttal effort whatever its intrinsic merit." *Id.*

agency assigns numerous staff members to " 'flyspeck' the rulemaking record and . . . 'remand' it within the agency for revision prior to promulgation." *Id.* at 296. And in those instances in which a reviewing court finds the agency record to have been inadequate and remands the proceeding, even longer delay occurs, as staff long since reassigned, revisit the rule in a changed "political, economic, and technological context that will radically alter the perceived rationality of the rule." *Id.* at 295. In such situations, "[d]elay will be measured in years." *Id.*

The standard at issue in this case demonstrates the halting pace of NHTSA rulemaking and the inappropriateness of granting petitioners a shield from liability under the guise of vindicating the supremacy clause. Notwithstanding that by the mid-1980's antilock brakes were in widespread and reliable use on trucks and other commercial vehicles in the United Kingdom and West Germany, *see* U.S. Department of Transportation, National Highway Traffic Safety Administration, *Improved Brake Systems for Commercial Motor Vehicles* § 3.3.3.3 (1991),[13] NHTSA did not propose a rule requiring antilock brakes on trucks until June 1992. *See* Federal Motor Vehicle Safety Standards, Stability and Control Requirements for Medium and Heavy Duty Vehicles, 57 Fed. Reg. 24212 (1992) (proposed June 8, 1992). As currently proposed, the agency will implement its regulation, depending on vehicle type, over the years 1996 through 1998, at least a decade after such technology was safe, reliable, and in widespread use in other industrialized nations. *See* Federal Motor Vehicle Safety Standards, Stability and Control Requirements for Medium and Heavy Duty Vehicles, 59 Fed. Reg. 17326, 17328 (1994) (supplemental notice

[13] *See also generally* U.S. Department of Transportation, National Highway Traffic Safety Administration, *European/Australian Experience with Antilock Braking Systems in Fleet Service* (1988); *see also* U.S. Congress, Office of Technology Assessment, *Gearing Up for Safety: Motor Carrier Safety in a Competitive Environment* 120, 122 (1988).

of proposed rulemaking, Apr. 12, 1994). If past experience is any guide, the agency's proposed implementation schedule may prove rather optimistic as industry challenges to the rule's validity forestall its taking effect.[14]

In petitioners' view, the existence of a NHTSA standard forecloses a common law claim premised on the same aspect of performance regardless of whether NHTSA's standard reflects the current state of technology. This is especially troubling in light of the criticism that NHTSA's standard-setting efforts "ha[ve] been largely ineffectual in forcing automotive technology" and that its rules only "required modest, incremental improvements in the safety technology of conventional vehicles." Mashaw & Harfst, *The Struggle For Auto Safety* at 70. Indeed, petitioners' view results in the preemption of claims even where a NHTSA standard reflects technology long since surpassed.[15] Adopting it would create a substantial incentive for manu-

[14] The Court is, of course, well aware of the tactics employed by some manufacturers in challenging NHTSA's standards and their costs. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). At issue in *Motor Vehicle Mfrs.* was NHTSA's passive restraint rule, FMVSS 208, 49 C.F.R. § 571.208, first proposed in 1969. 463 U.S. at 34-35. In commenting on the challenge to proposed Standard 208's airbag requirement, this Court observed that "[f]or nearly a decade, the automobile industry waged the regulatory equivalent of war." *Id.* at 49.

The Court also observed the lengthy delay entailed in promulgating Standard 208, which "[o]ver the course of approximately 60 rulemaking notices, [was] imposed, amended, rescinded, reimposed, and . . . rescinded again." 463 U.S. at 34. Further delay occurred on remand as the standard was amended again and subjected anew to judicial review. *See Public Citizen v. Steed*, 851 F.2d 444, 445-46 (D.C. Cir. 1988); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 477-78 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). In total, the promulgation of the passive restraint rule has been some twenty years in the making.

[15] Indeed, as Mashaw and Harfst note, "in some respects NHTSA's first rules were even less stringent than the GSA standards on which they were based." Mashaw & Harfst, *The Struggle For Auto Safety*, at 74.

facturers to refrain from developing new technology [16] and hold the public safety hostage to manufacturers' delaying tactics and bureaucratic inertia.

Ironically, petitioners read the Safety Act as consigning to the scrap heap not the industry's unsafe and outdated technologies, but rather the longstanding and efficacious common law rules recognizing that while compliance with government standards or industry practice may be evidence of reasonableness, it is not always its measure. Not only is petitioners' construction at odds with the statutory purpose of sections 1392(d) and 1397(k), it also frustrates Congress' express purpose of reducing the toll of traffic accidents, deaths and injuries. *See* 15 U.S.C. § 1381. The Court should not countenance such a result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.,
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

December 13, 1994

---

[16] As a leading authority explains, "if the only test is to be what has been done before, no industry . . . will ever have any great incentive to make progress in the direction of safety." *Prosser and Keeton On Torts* § 33, at 195.